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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

1  
2 JASON FYK,  
3 Plaintiff,  
4 v.  
5 FACEBOOK, INC.,  
6 Defendant.

Case No. 4:18-CV-05159-JSW

**META PLATFORMS, INC. (F/K/A  
FACEBOOK, INC.) RESPONSE TO  
PLAINTIFF JASON FYK'S MOTION FOR  
RELIEF PURSUANT TO FED. R. CIV. P.  
60(B) TO VACATE AND SET ASIDE  
ENTRY OF JUDGMENT**

Judge: Hon. Jeffrey S. White  
Dept.: Courtroom 5

Date Filed: August 22, 2018  
Date Closed: June 18, 2019

1           **I. INTRODUCTION**

2           For six years, Jason Fyk has burdened the Federal courts with frivolous lawsuits stemming  
 3 from an alleged decision by Facebook, Inc. (now known as Meta Platforms, Inc.) in 2016 to  
 4 remove some of Mr. Fyk’s Facebook pages. This Court, the United States District Court for the  
 5 District of Columbia, the Ninth Circuit Court of Appeals, and the United States Supreme Court  
 6 have all heard—and *denied*—Mr. Fyk’s numerous requests for relief. No matter, Mr. Fyk  
 7 continues apace and indeed appears to revel in generating a stream of baseless legal filings.<sup>1</sup>  
 8 Before this Court is Mr. Fyk’s latest—a *second* Rule 60(b) motion requesting the Court vacate  
 9 and set aside its June 2019 dismissal order on the purported basis that there has been an  
 10 intervening change in the controlling law.<sup>2</sup>

11           Mr. Fyk’s motion—like all his prior filings—is meritless. The law governing 47 U.S.C. §  
 12 230(c)(1) today remains the same as it did when the Court dismissed Mr. Fyk’s complaint in 2019  
 13 and when it denied his last Rule 60(b) motion in 2021. In fact, notwithstanding the fact the United  
 14 States Supreme Court considered changing the governing interpretation of 47 U.S.C. § 230(c)(1)  
 15 in *Gonzalez v. Google*, it elected *not* to do so and left the lower court jurisprudence undisturbed.  
 16 143 S. Ct. 1191, 1192 (2023) (“We therefore decline to address the application of § 230 to a  
 17 complaint that appears to state little, if any, plausible claim for relief.”). !

18           Defendant Meta respectfully requests this Court deny Mr. Fyk’s Rule 60(b) motion.

19           **II. PROCEDURAL HISTORY**

20           Mr. Fyk filed his lawsuit against Meta (then known as Facebook, Inc.) in 2018. Meta filed  
 21 a motion to dismiss, which this Court granted without leave to amend in June 2019.<sup>3</sup> The Court  
 22 held that Mr. Fyk’s claims are barred by Section 230(c)(1) of the Communications Decency Act  
 23 (“Section 230”). The Ninth Circuit affirmed that Order on June 12, 2020.<sup>4</sup> Undeterred, Mr. Fyk

24           <sup>1</sup> He gleefully exclaimed “Round 3 begins!” to his Twitter followers two days after filing his  
 25 most recent motion. See <https://twitter.com/jasonfyk?lang=en> (post dated June 18, 2023).

26           <sup>2</sup> Dkt. 61.

27           <sup>3</sup> See Dkts. 38, 46-2 (“the Order”) (reported at *Fyk v. Facebook, Inc.*, 2019 WL 11288576, at \*3  
 28 (N.D. Cal. June 18, 2019)).

29           <sup>4</sup> Dkt. 46-3 (reported at *Fyk v. Facebook, Inc.*, 808 F. App’x 597 (9th Cir. 2020))

1 filed a petition for hearing *en banc*, which was denied.<sup>5</sup> In 2020, Mr. Fyk sought review at the  
 2 Supreme Court. Mr. Fyk's petition was denied.<sup>6</sup>

3 The following year, Mr. Fyk returned to this Court and in March 2021 filed a motion  
 4 pursuant to Rule 60(b) to vacate the District Court's 2019 Order. Mr. Fyk asserted that "new legal  
 5 precedent" entitled him to relief, namely the Ninth Circuit's decision in *Enigma Software Group*  
 6 *USA, LLC v. Malwarebytes, Inc.*,<sup>7</sup> and a statement by Justice Clarence Thomas in the Supreme  
 7 Court's denial of *certiorari* in the *Enigma* matter. That motion was denied after this Court  
 8 determined that *Enigma* involved a section of the Communications Decency Act other than  
 9 §230(c)(1),<sup>8</sup> Justice Thomas's statement was not binding authority, and Mr. Fyk failed to show  
 10 any "extraordinary circumstances" that would entitle him to relief under Rule 60(b).<sup>9</sup> The Ninth  
 11 Circuit affirmed that order last October, and the Supreme Court again denied *certiorari* in April  
 12 of this year.<sup>10</sup>

13 Meanwhile, in May of 2022, Mr. Fyk launched yet another offensive. Unsuccessful in his  
 14 prior suits against Meta, he filed suit against the United States asserting that Section 230 is  
 15 unconstitutional.<sup>11</sup> The United States moved to dismiss for lack of standing. The United States  
 16 District Court for the District of Columbia granted that motion on June 9, 2023.<sup>12</sup>

17 One week later, Mr. Fyk ran back to this Courthouse and now, for a second time, requests  
 18 this Court vacate its original order dismissing his suit and cites six non-binding, inapplicable  
 19 decisions. As explained below, none of these decisions marks a change in the law that would  
 20 justify vacating or setting aside this Court's judgement in favor of Meta.

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21 <sup>5</sup> *Fyk v. Facebook, Inc.*, Case No. 19-16232, Dkt. 42 (9th Cir. July 21, 2020)

22 <sup>6</sup> *Fyk v. Facebook, Inc.*, 141 S. Ct. 1067 (2021) (*cert. denied*).

23 <sup>7</sup> 946 F.3d 1040 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020)

24 <sup>8</sup> 47 U.S.C. § 230(c)(2) and not 47 U.S.C. § 230(c)(1).

25 <sup>9</sup> *Fyk v. Facebook, Inc.*, 2021 WL 5764249, at \*1 (N.D. Cal. Nov. 1, 2021) (denying motion to  
 26 vacate).

27 <sup>10</sup> *Fyk v. Facebook, Inc.*, 2022 WL 10964766 (9th Cir. Oct. 19, 2022), *cert. denied*, 2023 WL  
 2959399 (U.S. Apr. 17, 2023).

28 <sup>11</sup> *Fyk v. United States of America*, Case No. 1:22-cv-01144, Dkt. 2 (D. D.C. May 2, 2022)

<sup>12</sup> *Fyk v. United States of America*, 2023 WL 3933719 (D. D.C. June 9, 2023).

1                   **III.    LEGAL STANDARD**

2                   Plaintiff moves for relief under Rules 60(b)(5) and 60(b)(6). They provide:  
 3                   Rule 60(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion  
 4                   and just terms, the court may relieve a party of its legal representative from a final  
 judgment, order, or proceeding for the following reasons:

5                   (5) the judgment has been satisfied, released, or discharged; it is based on an  
 6                   earlier judgment that has been reversed or vacated; or applying it prospectively is  
 7                   no longer equitable; or

8                   (6) any other reason that justifies relief. Fed. R. Civ. Proc. §§ 60(b)(5), 60(b)(6).

9                   “Rule 60(b)(5) does not authorize relief from a judgment on the ground that the *law*  
 10                  applied by the court in making its adjudication has been subsequently overruled or declared  
 11                  erroneous in another and unrelated proceeding” *Lowry Develop., L.L.C. v. Groves & Assocs. Ins., Inc.*, 690 F.3d 382, 386 (5th Cir. 2012). A judgment has “prospective application” only if “it is  
 13                  executory or involves the supervision of changing conduct or conditions.” *Maraziti v. Thorpe*, 52 F.3d 252, 254 (9th Cir. 1995) (internal quotes omitted). A court dismissal of claims is not  
 16                  executory, nor does it require ongoing supervision. “That plaintiff remains bound by the dismissal  
 17                  is not a ‘prospective effect’ within the meaning of [R]ule 60(b)(5) any more than if plaintiff were  
 18                  continuing to feel the effects of a money judgment against him.” *Id.* (quoting *Gibbs v. Maxwell House*, 738 F.2d 1153, 1155–56 (11th Cir. 1984)).

21                  As for Rule 60(b)(6), its application is limited to “extraordinary circumstances” given the  
 22                  “strong public interest in [the] timeliness and finality of judgments.” *Phelps v. Alameida*, 569 F.3d 1120, 1135 (9th Cir. 2009); *Anderson v. Arnold*, 2017 WL 977590, at \*2 (E.D. Cal. Mar. 14, 2017) (“The ‘extraordinary circumstances’ standard for assessing a Rule 60(b)(6) motion is  
 25                  intended to avoid a mere ‘second bite at the apple.’”).

27                   **IV.    ARGUMENT**

28                  Plaintiff rests his Rule 60(b) motion on the supposed issuance of “[n]ew law that directly

1 impacts the outcome of this case[.]”<sup>13</sup> More specifically, Plaintiff cites six cases: three appellate  
 2 decisions, two district court decisions, and a Supreme Court *certiorari* denial. As noted above,  
 3 even “new law[,]” by itself is not necessarily sufficient to merit relief under Rule 60(b). But as  
 4 explained below, the Court can sidestep that question because none of the cases Mr. Fyk cites  
 5 breaks new ground. None of these decisions altered the applicable legal framework for  
 6 interpreting Section 230(c)(1) and consequently none provides any basis for disturbing the  
 7 Court’s June 2019 order dismissing Mr. Fyk’s case. In any event, even if these decisions did  
 8 create new law, Mr. Fyk’s motion should be denied because it is untimely under Rule 60(c).

9                   **A.       Court of Appeals Decisions**

10 Plaintiff cites three appeals court decisions, none of which is applicable to the present  
 11 matter.

12                   **1.       *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021)**

13 Plaintiff cites the Ninth Circuit’s May 2021 decision in *Lemmon v. Snap* and urges this  
 14 court to “pay attention to it”<sup>14</sup> without ever explaining the holding or its application to this matter.  
 15 The *Lemmon* decision is inapplicable. In *Lemmon*, plaintiffs sued Snap, maker of the Snapchat  
 16 mobile application, for claims arising from a feature that Snapchat designed called the “Speed  
 17 Filter,” which enabled users to record their driving speed and post it on their Snapchat account.  
 18 The Ninth Circuit held the filter and Snap’s alleged system of incentivizing users to use the filter  
 19 worked together to encourage Snapchat users to drive at excessive speeds and then post photos or  
 20 videos.<sup>15</sup> The Ninth Circuit made clear that the facts in *Lemmon* did not involve Snap’s role in  
 21 “editing, monitoring, or removing of the content that its users generate through Snapchat.”<sup>16</sup> In  
 22 *Lemmon*, the harm could occur even if the photo or video was not shared because the allegation  
 23 was that individuals were incentivized by the filter to drive at unsafe speeds. *Id.* The Ninth Circuit  
 24 held that if the claims had sought to hold Snap liable for publishing user content, those claims

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 26                   <sup>13</sup> Dkt. 61 at 25.  
 27                   <sup>14</sup> *Id.* at 5 n. 6.  
 28                   <sup>15</sup> *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1091–92 (9th Cir. 2021).  
 16                   <sup>16</sup> *Id.* at 1092.

1 would fall outside its decision and would be barred by Section 230(c)(1).<sup>17</sup>

2 By contrast, here the Court held in its June 2019 order that Mr. Fyk's claims rested upon  
 3 the precise sort of claim that the Ninth Circuit held it was *not* addressing and that would be barred  
 4 by Section 230—decisions regarding what content to publish.<sup>18</sup>

5 **2. *Henderson v. The Source for Public Data LP*, 53 F.4th 110 (4th Cir.  
 6 2022)**

7 Plaintiff cites the Fourth Circuit's November 22, 2022 decision in *Henderson v. The*  
 8 *Source for Public Data*. Notably, Plaintiff brought this decision to the Ninth Circuit's attention  
 9 last November, but the Ninth Circuit was unmoved to offer any relief.<sup>19</sup>

10 In *Henderson*, the Fourth Circuit held that companies that collected and sold public  
 11 records could be liable under the Fair Credit Reporting Act and not avail themselves of  
 12 protections under Section 230 because they were not mere forums for uploading information but  
 13 were information content providers themselves. Mr. Fyk suggests that in *Henderson* the Fourth  
 14 Circuit “vacated” its earlier decision in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir.  
 15 1997). Not true—the Fourth Circuit panel in *Henderson* did not overrule *Zeran*. Regardless,  
 16 *Henderson* is inapplicable because the court noted that it was explicitly *not* addressing the  
 17 applicability of Section 230(c)(1) in situations where, as is the case here, a plaintiff seeks to  
 18 impose liability based on a defendant's decision not to publish certain content.<sup>20</sup>

19 Moreover, the Fourth Circuit's decision in *Henderson* is not binding precedent and, as  
 20 another court in this District has already noted, “the Fourth Circuit's narrow construction of  
 21 Section 230(c)(1) appears to be at odds with Ninth Circuit decisions indicating that the scope of  
 22 the statute's protection is much broader.” *Divino Grp. LLC v. Google LLC*, 2023 WL 218966, at  
 23

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25 <sup>17</sup> *Id.* at 1093 n.4.

26 <sup>18</sup> See Dkt. 38 at 4 (“Here, all three of Plaintiff's claims arise from the allegations that Facebook  
 27 removed or moderated his pages.”).

<sup>19</sup> *Fyk v. Facebook, Inc.*, Case No. 21-16997, Dkt. 38-1 (9th Cir. Nov. 7, 2022).

<sup>20</sup> *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 125 n. 18 (4th Cir. 2022).

\*2 (N.D. Cal. Jan. 17, 2023).<sup>21</sup> Because Ninth Circuit decisions, including *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009)—which this Court cited in its June 2019 order—remain controlling precedent, nothing in *Henderson* constitutes a change in the law that binds this Court. Consequently, *Henderson* does not mark a change in the law that would entitle Mr. Fyk to seek Rule 60(b) relief.

**3. *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446 (5th Cir. 2022)**

Plaintiff next cites the Fifth Circuit's decision in *Jarkesy v. Sec. & Exch. Comm'n*. But that case is inapplicable. It concerns the constitutionality of the SEC's adjudication of fraud claims via administrative proceedings. But no administrative agency is at issue in Mr. Fyk's claim and, more importantly, the Fifth Circuit issued no ruling concerning Section 230.

**B. District Court Decisions**

Mr. Fyk cites two cases from the Northern District—*Rumble Inc. v. Google, LLC*, 2022 WL 3018062 (N.D. Cal. July 29, 2022) and *DZ Reserve v. Meta Platforms, Inc.*, 2022 WL 912890 (N.D. Cal. Mar. 29, 2022). The former is a Sherman Act antitrust matter. The latter is a class action alleging Meta committed various torts and UCL violations by allegedly providing its advertisers inaccurate metrics regarding the potential audience for their advertisements. Notably, neither case broke new ground interpreting Section 230. In fact, Mr. Fyk does not identify *any* orders from those cases that even address Section 230. Consequently, neither provides any basis for the Court to vacate its June 2019 order.

**C. *Certiorari* Denial**

Finally, Mr. Fyk cites the Supreme Court's decision denying *certiorari* in *Doe v. Facebook, Inc.*, 142 S. Ct. 1087 (2022). There, Justice Thomas wrote that he concurred with the denial but suggested that “the proper scope of immunity under § 230” should be addressed in a

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<sup>21</sup> See also *Bride v. Snap Inc.*, 2023 WL 2016927, at \*7 n. 6 (C.D. Cal. Jan. 10, 2023) (“To the extent the Fourth Circuit's decision in *Henderson v. The Source of Public Data*, 53 F.4th 110, 122 (4th Cir. 2022), in which the Fourth Circuit Court of Appeal reinterpreted its prior conception of “publication” under § 230(c)(1) in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997)), is implicated here, the court finds it unpersuasive in light of broader view adopted by the Ninth Circuit, see, e.g., [Fair Hous. Council of San Fernando Valley v.] Roommates, 521 F.3d [1157,] at 1170-71[(9th Cir. 2008)]; see also *Monsarrat v. Newman*, 28 F.4th 314, 320 (1st Cir. 2022).”).

1 later case. *Id.* at 1089. Justice Thomas made no new pronouncement about Section 230 nor could  
 2 he; a statement by a single Justice in a *certiorari* denial does not create new law, much less create  
 3 binding precedent for this Court. *Maryland v. Wilson*, 519 U.S. 408, 412–13 (1997) (“We agree  
 4 with respondent that the former statement was *dictum*, and the latter was contained in a  
 5 concurrence, so that neither constitutes binding precedent.”). Notably, following the *certiorari*  
 6 denial in *Doe*, the Supreme Court did invite briefing and oral argument on the scope of Section  
 7 230 in *Gonzalez v. Google*. But the Court ultimately elected not to disturb any lower court  
 8 decisions interpreting Section 230. 143 S. Ct. at 1192. In short, *Doe* provides Mr. Fyk no relief.<sup>22</sup>

9 **D. Mr. Fyk’s Rule 60(b) motion is untimely.**

10 Although none of the cases Mr. Fyk cites created new law or provides any other basis for  
 11 this Court to disturb its prior dismissal, even if they did, the motion should be denied for another  
 12 reason: it is untimely. Under Rule 60(c), a motion for relief under Rule 60(b) “must be made  
 13 within a reasonable time.” Notably, the Ninth Circuit last fall affirmed this Court’s first Rule  
 14 60(b) denial because Mr. Fyk acted too late in raising a challenge based on the *Enigma Software*  
 15 *Group* case. *See Fyk*, 2022 WL 10964766, at \*2 (affirming this Court’s prior Rule 60(b) dismissal  
 16 because Mr. Fyk untimely raised the *Enigma Software Group* case *nine months* after the decision  
 17 was issued). The court decisions Mr. Fyk relies upon were decided eight months<sup>23</sup> to two years  
 18 ago.<sup>24</sup> Mr. Fyk could have but failed to act sooner than he did.

19 **V. CONCLUSION**

20 Mr. Fyk’s meritless Rule 60(b) motion—now his second—should suffer the same fate as  
 21 his first: denial. Given Mr. Fyk’s litigation history, Defendant is understandably concerned that  
 22 denial of his motion will inevitably result in an appeal to a Ninth Circuit panel, followed by a  
 23 request for rehearing *en banc* by the Ninth Circuit, followed by a *certiorari* petition to the United  
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 26 <sup>22</sup> Cf. *Maryland v. Wilson*, 519 U.S. 408, 412–13 (1997) (holding that neither *dictum* statements  
 nor statements in a concurrence constitute precedent).

27 <sup>23</sup> *Henderson v. The Source for Public Data, L.P.*, 53 F. 4th 110 (4th Cir. 2022).

28 <sup>24</sup> *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021).

1 States Supreme Court, followed by return to this Court for a third Rule 60(b) motion based upon  
 2 any new cases addressing Section 230 that issue in the interim. Federal court can “regulate the  
 3 activities of abusive litigants by imposing carefully tailored restrictions . . . under appropriate  
 4 circumstances.” *De Long v. Hennessey*, 912 F.2d 1144, 1148 (9th Cir. 1990). “Flagrant abuse of  
 5 the judicial process cannot be tolerated because it enables one person to preempt the use of  
 6 judicial time that properly could be used to consider the meritorious claims of other litigants.” *Id.*  
 7 at 1148. Should the Court not use its inherent powers to control its docket and Mr. Fyk’s ability to  
 8 clog that docket with frivolous filings, Defendant respectfully requests the Court remind Mr.  
 9 Fyk—who is represented by counsel—of the stringent requirements of Rule 11(b) and its  
 10 requirement that no filing be “presented for an improper purpose.”  
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13 Dated: June 30, 2023

KEKER, VAN NEST & PETERS LLP

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 16 PAVEN MALHOTRA  
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